S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JOSEPH M. HENDERSON,

Plaintiff-Appellant,

v

HAMMER BUILDING AND RESTORATION, INC.,

Defendant-Appellee.

UNPUBLISHED
December 1, 2005

No. 255187
Saginaw Circuit Court
LC No. 03-47916-NO

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts and Procedural History

In July of 2001, plaintiff's employer, KMT, Inc. Electrical Contractors, assigned him to work at a fire-damaged home in Auburn. Defendant was the general contractor in charge of the overall restoration project. On July 6, plaintiff was working on the wiring in the basement of the home while two of defendant's employees were attempting to pump out the water that had accumulated there. After the majority of the water had been removed, plaintiff went upstairs to retrieve light bulbs for a fixture he had just installed. On his way back into the basement, plaintiff allegedly slipped on a wet rag, fell down the stairs, and injured his back.

In April of 2003, plaintiff commenced the present suit against defendant. In his complaint, plaintiff alleged that defendant breached his common law duty as a general contractor to "implement reasonable safety measures in common work areas to guard against readily observable, avoidable serious risks of personal injury, including . . . trip hazards." Plaintiff also alleged that defendant was liable for the ordinary negligence of its employees under the doctrine of respondeat superior. In April of 2004, the trial court determined that the open and obvious doctrine applied to plaintiff's claims and, on that basis, granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (10).

On appeal, plaintiff asserts that the trial court erroneously applied the open and obvious doctrine to his ordinary negligence claim where that doctrine only applies to premises liability

claims. Plaintiff further contends that, even if the open and obvious doctrine were applicable to his ordinary negligence claim, the trial court erred when it determined that the rag was an open and obvious hazard as a matter of law. Finally, plaintiff also argues that there were fact questions concerning defendant's liability under the common work area doctrine and, therefore, the trial court erred when it granted defendant's summary disposition motion.

II. Standards of Review

We review de novo a trial court's decision to grant or deny summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A trial court properly grants a motion for summary disposition pursuant to MCR 2.116(C)(8) where the opposing party has failed to state a claim on which relief can be granted. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 42; 672 NW2d 884 (2003). Such motions test the legal sufficiency of a claim based solely on the pleadings. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). When considering motions brought under MCR 2.116(C)(8), courts must accept all well-pleaded factual allegations as true and construe them in the light most favorable to the non-moving parties. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The motions "may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* (internal quotations omitted).

Under MCR 2.116(C)(10), summary disposition is appropriate when there is "no genuine issue as to any material fact." A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding on a motion under this rule, a court must consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

III. Analysis

We shall first address plaintiff's claim that defendant was liable as a general contractor under the common work area doctrine.

Under Michigan's common law, "property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004); *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985) (Noting the "general rule that an employer of an independent contractor is not liable for the contractor's negligence or the negligence of his employees."). However, as with most general rules, there are exceptions. One such exception is the "common work area doctrine." *Ormsby*, *supra* at 55-56. To fall under this exception, a plaintiff "must show that (1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Id.* at 54. Our Supreme Court has made it clear that "only when this test is satisfied may a general contractor be held liable for the

alleged negligence of the employees of independent subcontractors with respect to job site safety." *Ghaffari v Turner Constr Co*, 473 Mich 16, 21; 699 NW2d 687 (2005).

In the present case, plaintiff has not alleged that defendant should be held liable for the negligence of an independent subcontractor or the employees of an independent subcontractor. Indeed, plaintiff alleged that the negligence of defendant's own employee was the direct and proximate cause of his injuries. Because the common work area doctrine is an exception to the general rule that a general contractor is not liable for the negligent acts of independent contractors and their employees, it does not properly apply to situations involving the general contractor's own employees. Hence, summary disposition in favor of defendant on the common work area claim was appropriate.[1]

Plaintiff next argues that the trial court erroneously applied the open and obvious doctrine to his ordinary negligence claim where it is properly applicable only to premises liability claims. We disagree.

Premises liability concerns the duty imposed on premises possessors to protect their invitees from "an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).[2] Because plaintiff's claim arises out of a dangerous condition on the land, it is an action based on premises liability. Further, courts in Michigan have long recognized that premises liability may be premised on an unsafe condition created by the active negligence of a premises possessor's employees. See *Clark v Kmart Corp*, 465 Mich 416, 419; 634 NW2d 347 (2001), quoting *Serinto v Borman Food Stores*, 380 Mich 637, 640-641; 158 NW2d 485 (1968). Hence, the fact that plaintiff alleged that the dangerous condition was created by defendant's employee does not alter the nature of the claim.[3] Because plaintiff's claim is based on premises liability, the open and

[1] Even were we to determine that the common work area doctrine applied under the present facts, we would conclude that, as a matter of law, the wet rag was not a hazard that posed a "high degree of risk to a significant number of workmen." *Ormsby*, *supra* at 54. Consequently, plaintiff's claim under the common work area doctrine would still fail.

[2] Defendant need not be the owner of the property in order to be liable as a premises possessor. Instead, to be considered a premises possessor, defendant need only have had possession and control of the area where the accident occurred at the time of plaintiff's injury. *Derabian v S & C Snowplowing*, 249 Mich App 695, 702-703; 644 NW2d 779 (2002). While Dennis Nicklyn testified at his deposition that the owner of the home was living on site, defendant was given possession and control of the basement to make the necessary repairs and, therefore, was the premises possessor at the time of plaintiff's injury. Even if defendant were not the premises possessor, defendant would still be subject to the same liability and defenses as if he were a premises possessor for any injuries caused upon the land by its actions. See 2 Restatement Torts, 2d, §§ 383-385, p287-295.

[3] Had plaintiff's injuries been caused by defendant's employee's conduct, other than conduct creating a dangerous condition on the land, then plaintiff's claim would have sounded in ordinary negligence. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).

obvious doctrine is applicable. See *Laier v Kitchen*, 266 Mich App 482, 487-490; 702 NW2d 199 (2005) (opinion by Neff, J. with Hoekstra, J. concurring as to that part).

In cases of premises liability, there is a general duty on the part of the party in possession of the premises to take reasonable steps to protect invitees from an unreasonable risk of harm caused by dangerous conditions present on the premises. *Lugo*, *supra* at 516. "However, this duty does not generally encompass removal of open and obvious dangers." *Id.* The Court in *Lugo* further explained that "the open and obvious doctrine should not be viewed as some type of 'exception' to the duty generally owed invitees, but rather as an integral part of the definition of that duty." *Id.* Thus the "general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers, but, if special aspects of a condition make even an open and obvious risk unreasonably dangerous, the premises possessor has a duty to undertake reasonable precautions to protect invitees from that risk." *Id.* at 517. An open and obvious danger exists where the dangers "'are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them . . . .'" *Joyce v* Rubin, 249 Mich App 231, 238; 642 NW2d 360 (2002), quoting *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). When determining whether a condition is open and obvious, the court applies a reasonable person standard. *Novotney v Burger King (On Remand)*, 198 Mich App 470, 474; 499 NW2d 379 (1993) ("[A]n obvious danger is no danger to a reasonably careful person.") (citation omitted). A dangerous condition is open and obvious if it is "readily apparent or easily discoverable upon casual inspection by the average user of ordinary intelligence." *Id.* at 473.

In the present case, we agree with the trial court's conclusion that the wet rag was an open and obvious hazard. Furthermore, there were no special aspects that would render the risk posed by the rag unreasonably dangerous. Consequently, summary disposition was properly granted in favor of defendant on plaintiff's ordinary negligence claim.

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello